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IN THE

Supreme Court Of The United States

No.____

OCTOBER TERM, 1980

State of Arkansas.....*Petitioner*

VS.

Michael Devond Prue and
Cathy Lucille Prue.....*Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

1. Whether an affidavit for a search warrant containing hearsay must set out underlying circumstances showing the reliability of the hearsay declarant and his information where the informant/declarant is named in the affidavit?

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The petitioner respectfully prays this Court to issue forth a writ of certiorari to review the judgment and opinion of the Arkansas Supreme Court set out herein, *infra.*

OPINION BELOW

The opinion of the Arkansas Supreme Court appears as *State v. Prue and Prue,* 272 Ark. Ad. Sh. 221, 614 S.W.2d 221 (1981) and is reproduced in the Appendix, *infra.* The order of the Arkansas Supreme Court denying rehearing was entered on May 11, 1981, without opinion.

JURISDICTIONAL STATEMENT

The opinion of the Arkansas Supreme Court was issued on March 23, 1981. The petition for rehearing was denied without opinion on May 11, 1981.

This Court has jurisdiction by virtue of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT 14

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At 7:00 A.M. on Saturday, June 21, 1980, an informant telephoned Dale Best, a criminal investigator for the Arkansas State Police, and informed Best of certain illegal activities he had observed at the home of the respondents herein, Michael and Cathy Prue. The informant told Best that, at approximately 3:00 A.M. that morning, he had been in the Prue residence and that Michael Prue indicated that he had LSD for sale. He told Best that Michael Prue took him to his refrigerator where he showed the informant several bags containing numerous doses of LSD.

Officer Best subsequently contacted a deputy prosecuting attorney, and a search warrant was obtained based upon Officer Best's affidavit relating the informant's information. (T. 23, 25) The affidavit for a search warrant stated that the informant was an individual named "Wesley Fredrickson, age 21, a resident of Benton County." (T. 25) The search warrant was executed, and some 80 dosage units of LSD, as well as marijuana and drug paraphernalia, were seized. (T. 23)

On June 26, 1980, an information was filed in the Benton County, Arkansas Circuit Court charging the respondents herein with several counts of possession of controlled substances with intent to deliver and manufacture of a controlled substance, all in violation of Ark. Stat. Ann. §82-2617 (Repl. 1976). (T. 3)

The respondents filed a motion to suppress the fruit of the search and a hearing was held thereon on August 25, 1980. (T. 10-15, 15D) The respondents' motion was granted in a written opinion and order on the grounds that the affidavit in this case satisfied neither the two-pronged test

set out by *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), nor the requirements of Rule 13.1(b), Arkansas Rules of Criminal Procedure, Ark. Stat. Ann., Vol. 4A, pp. 467, 468 (Repl. 1977). (T. 15A-15D)

Pursuant to Rule 36.10, Arkansas Rules of Criminal Procedure, Ark. Stat. Ann., Vol. 4A, p. 519 (Supp. 1979), the State of Arkansas appealed this ruling to the Arkansas Supreme Court. (T. 16) The ruling was affirmed by the Arkansas Supreme Court in an opinion delivered on March 23, 1981 and reproduced, *infra*, in the appendix.

The issue now presented to this Court, whether the hearsay statements of a citizen informer contained in an affidavit for a search warrant must meet the rigors of the *Aguilar* two-pronged test, was presented to the trial court in argument, (T. 15B, 15C) and to the Arkansas Supreme Court in a petition for rehearing.

ARGUMENT

I.

AN AFFIDAVIT FOR A SEARCH WARRANT CONTAINING HEARSAY NEED NOT SET OUT UNDERLYING CIRCUMSTANCES SHOWING THE RELIABILITY OF THE HEARSAY DECLARANT AND INFORMATION WHERE THE INFORMANT/DECLARANT IS NAMED IN THE AFFIDAVIT.

In *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), this Court set out a two-pronged test for determining whether affidavits containing hearsay and submitted for the purpose of issuing search warrants were sufficient for that purpose. To be sufficient, such an affidavit must state (1) underlying circumstances from which the informant concluded that items to be seized pursuant to the warrant were where he claimed they were and (2) underlying circumstances from which the affiant/law enforcement officer concluded that the informant was credible or his information reliable. 378 U.S. at 114.

The petitioner contends, and several courts have held, that the strictures of *Aguilar* do not apply to the case of an affidavit containing hearsay if the hearsay declarant is named. In other words, the case of the citizen informer is not within the purview of *Aguilar* and its progeny.

As stated in *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711, 717 (1971):

> . . . the citizen informer, adviser, or reporter who acts openly to see that our laws are enforced should be encouraged, and his information should not be

> subjected to the same tests as are applied to the information of an ordinary informer. *People v. Hoffman*, 45 Ill.2d 221, 258 N.E.2d 326 (1970); *People v. Carter*, 116 Ill. App.2d 62, 253 N.E.2d 490 (1969); *People v. Hester, supra; State v. Mazzadra*, 28 Conn. Supp. 252, 258 A2d 310 (1969); *People v. Griffin*, 250 Cal. App. 2d 545, 58 Cal. Rptr. 707 (1967). (Emphasis Added.)

See, also, *Montique v. State*, 288 Or. 359, 605 P.2d 656 (1980); *State v. O'Bryan*, 96 Idaho 548, 531 P.2d 1193 (1975); *Guzewiez v. Commonwealth*, 212 Va. 730, 187 S.E.2d 144 (1972); *Walker v. State*, 196 So.2d 8 (Fla. App. 1967).

The rationale behind these decisions was aptly stated in Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741, 769-72 (1974), as follows:

> "The typical paid or protected police informant—drawn from the criminal milieu—is almost universally viewed with a jaundiced eye. He is inherently suspect. He hides behind a cloak of anonymity. His information—just as the testimony of an accomplice—is looked upon with a healthy skepticism and is examined with great scrutiny. The citizen-informer—with no ax to grind and motivated by civic duty—is in stark contrast * * *."
>
> " * * *
>
> "'Veracity,' rather, in one or the other of its disjunctive manifestations (i.e., credibility or reliability), flows from the very status of the citizen-informer."

The Arkansas Supreme Court held contrary to the above-cited cases, ruling in effect that it was of no moment that the informant was named. Thus, the Arkansas

Supreme Court, a state court of last resort, has decided a federal question concerning the Fourth Amendment to the United States Constitution in conflict with the decisions of other state courts of last resort. Such a decision is a consideration in determining whether this Court will grant a writ of certiorari. See Rule 17(b), Rules of the Supreme Court of the United States.

Another consideration in determining whether this Court will grant certiorari stated in Rule 17(b) is a conflict between a decision of a state court of last resort and a federal court of appeals on the same federal questions. That consideration applies to the instant case.

At least two federal courts of appeal have ruled contrary to the cases cited above. See *United States v. Chafin*, 622 F.2d 927 (6th Cir. 1980) and *McCreary v. Sigler*, 406 F.2d 1264 (8th Cir. 1969). *Chafin* held that it was of no moment that the informant was named, and *McCreary* held that the naming of an informant was a factor to be considered in passing on the sufficienty of an affidavit, but not enough in itself to tip the scales in favor of a finding of sufficiency.

The petitioner notes lastly the absence of any decision from this Court clearly addressing this issue. Consequently, a third consideration in deciding whether to issue a writ of certiorari is here present. See Rule 17(c), which provides in pertinent part, "When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court."

CONCLUSION

For the aforementioned reasons and authorities, the petitioner respectfully prays this Court to issue a writ of certiorari to the Arkansas Supreme Court.

Respectfully submitted,

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SUPREME COURT OF ARKANSAS

No. CR 80-250

STATE OF ARKANSAS, APPELLANT, V. MICHAEL DEVOND PRUE AND CATHY LUCILLE PRUE, APPELLEES.

Opinion Delivered Mar 23, 1981

APPEAL FROM BENTON CIRCUIT COURT; W. H. ENFIELD, JUDGE

AFFIRMED

JOHN I. PURTLE, Associate Justice

This is an interlocutory appeal on behalf of the state from the order of the Benton County Circuit Court suppressing certain evidence because of the deficiency of the affidavit for a search warrant. We think the trial court made the proper decision under the circumstances.

The affidavit for the search warrant stated in pertinent part as follows:

> The undersigned being duly sworn deposes and says: That he (has reason to believe) that (on the premises known as) Michael D. Prue residence, in the Beaver Shores addition, first house east of Cypress Street and Birch Lane intersection, the residence is on Cypress Street, south side, facing east, grey with white trim single family frame structure, the next house to the east is purple in color. Bronze 1972 Chevrolet Camaro, Ark. license IBZ 681, registered to Michael D. or Kathy L. Prue.

* * *

> in the County of Benton, State of Arkansas, there is now being concealed certain property, namely LSD and marijuana WHICH ARE in violation of Ark. Stat. 82-2617 . . . the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> Wesley Fredrickson, age 21, a resident of Benton County, reported to me, Dale Best, Arkansas State Police undercover officer, that on 6-21-80 at approx. 3:00 a.m. that he was at the Michael D. Prue residence, described above. Michael Prue indicated he had some LSD for sale and then he went to the refrigerator and removed a large ziplock type bag that contained several smaller bags, four of which contained 25 to 50 dosage units of what was represented by Michael Prue as being LSD and that it was for sale. At approx. 10:45 a.m. on 6-21-80 Trooper Keith Ferguson, Officers Gary Armstrong, of Rogers Police Department had the above described residence under surveillance and saw Michael D. Prue loading several items into a bronze colored, 1972 Chevrolet Camaro, Ark. License number IBZ 681. This vehicle was then stopped and secured by police officers and the occupants of the vehicle, Michael D. Prue and Cathy L. Prue. Wesley Frederickson also stated to me that he has purchased marijuana from Michael D. Prue, at the above described residence, on numerous occasions over the last six months.

This question will be considered under the Fourth and Fourteenth Amendments to the United States Constitution and Art. 2 §15 of the Constitution of the State of Arkansas and the following statute and rules:

Ark. Stat. Ann. §43-205 (A) (Repl. 1977):

> A search warrant may be issued by any judicial officer of this State, only upon affidavit sworn to before a judicial officer which establishes the grounds for its issuance.

Rules of Criminal Procedure, Rule 13.1 (b):

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.

Rules of Criminal Procedure, Rule 13.3 (b):

> In the course of any search or seizure pursuant to the warrant, the executing officer shall give a copy of the warrant to the person to be searched or the person in apparent control of the premises to be searched. The copy shall be furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case he shall, as soon as is practicable, state his authority and purpose and furnish a copy of the warrant. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.

This case stands or falls upon that portion of the affidavit for the search warrant which attempts to establish the grounds for issuance of the search warrant. To be exact, the informant is described as follows:

> Wesley Fredrickson, age 21, a resident of Benton County, reported to me, Dale Best, Arkansas State Police undercover officer, . . .

There is nothing further in the affidavit concerning the identity of the informant. There are no words which even remotely hint that the informant had furnished prior information which had been reliable. In fact, there is not even a hint that the informant was acquainted with the affiant. Certainly, if the undercover officer had been able to make this statement of his own knowledge, there would be no question about the validity of the affidavit. However, when the reliance is totally upon a statement by an informant who has not been proven, it must stand a much more rigid test. As stated in Rule 13.1 (b), if an affidavit or testimony is based in whole or in part on hearsay, the affiant shall set forth the particular facts relating to the informant's reliability. There are no such facts in this case.

The landmark case of *Aguilar v. Texas*, 378 U.S. 108 (1964), establishes a two-pronged test in cases where an officer obtains a search warrant on the basis of an informer's statement. The two prongs of the test are: (1) some underlying circumstance showing that the informant is reliable; and (2) some underlying circumstance from which the informer concluded that the contraband was where he said it was. This case stands for the same proposition today. It is the first part of the two-pronged test which is the problem in the present case. Certainly there is nothing in the affidavit itself which would buttress any assumption that the informer was reliable. We must then turn to other cases for a further understanding of the problem. In the case of *Little Rock Police Dept. v. One 1977 Lincoln Cont.*, 265 Ark. 512, 580 S.W.2d 451 (1979), we dealt with the same problem. There we held that the Aguilar test was still the law in Arkansas. The informer in the *Little Rock Police Dept.* case described the driver and the automobile in quite some detail. However, he failed to satisfy either of the two requirements of *Aguilar*. It was also shown that the

informant had worked with the police before but he had never worked with the affiant. In disposing of the case we stated:

> Here neither requirement was satisfied. As to reliability, Officer Dawson had not previously acted upon information supplied by the informer, nor is it shown that the officer had any other basis for believing the informer to be reliable. The hearsay statement that "the office" had worked with him is not enough. Nor was the second requirement met. The informer merely said that Sands would be driving a certain car in delivering ten pounds of marijuana to the SAE House. He did not indicate in any way whatsoever how he reached that conclusion. Thus none of the underlying circumstances essential to a finding of probable cause were shown to exist. ...

We also considered the sufficiency of the affidavit for search warrant in *Lunsford v. State*, 262 Ark. 1, 552 S.W.2d 646 (1977). The affidavit in *Lunsford* was made by the sheriff who stated he had reason to believe that marijuana was concealed in a mobile home occupied by Lunsford. His information came from an unnamed reliable informant who stated that Lunsford had a quantity of marijuana upon the premises for sale. The affidavit contained a statement of sufficient reason for believing the informant to be reliable, but there was no statement of any fact to show how the informant knew marijuana was in the mobile home. Thus, the second prong of the Aguilar test was missing. At the hearing the state attempted to supply the deficiency but was not allowed to do so. For a long time this court has recognized that an affidavit merely stating conclusions of an unidentified informant is not sufficient for a magistrate to find probable cause for the issuance of a warrant. *Walton and Fuller v. State*, 245 Ark. 84, 431 S.W.2d 462 (1968). In *Lunsford* we further set out the requirement that the state

was required to carry the burden of establishing the validity of a search warrant when its validity has been challenged. *Russ v. City of Camden*, 256 Ark. 214, 506 S.W.2d 529 (1974).

Both sides seem to have relied on *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977). This again was the challenge to the sufficiency of an affidavit and its relation to the reliability of the informant. The affidavit in *Baxter* stated in part as follows:

> . . . The informant states that barbiturates are presently stored in a refrigerator in the Baxter's residence and a large quantity of marijuana is being hidden in one of the bedrooms of the residence. * * * I believe my informant since Mr. Baxter has a long standing reputation with me and other police agents as a drug seller. (She (informant) is an addict and has been reliable as an informant to Benton City Police.)

The difference between the affidavit in *Baxter v. State*, supra, and the present case is immediately obvious. In *Baxter* both prongs of the Aguilar test were met. The informant had been proven reliable, and she described in detail where the marijuana was stored.

We next consider the case of *State v. Lechner*, 262 Ark. 401, 557 S.W.2d 195 (1977). Again, we announced our adherence to the Aguilar rule. The affiant in this case stated that his information was supplied by two undisclosed informants whom he asserted were reliable. In fact, the affidavit starts out as follows:

> Affiant states that on 1-28-76 a reliable confidential informant, who has proven to be very reliable in the past and whose information has resulted in the arrest of two felony cases, observed in the above-mentioned residence

> a large quantity of amphetamines (cross tops) and cocaine.

Again, it is obvious that the informant was reliable. No such statement was contained in the case before us. In *Lechner* we further stated:

> But what of the informant who has just gone into the business or one who might be called the citizen-informer and has no prior record of deals with the police in such matters? This is a tough problem, and perhaps the one we have before us. In that case there must be something in the affidavit or evidence presented to show the judge that the tip can be relied upon or the informant is telling the truth. If other evidence, besides the affidavit is before the issuing judge, it must be presented under oath and a record made of that evidence.

Appellant's argument quotes extensively from *Baxter v. State*, supra, which refers to *United States v. Harris*, 403 U.S. 573 (1971). The quotation from *Baxter* indicates that *Harris* stands for the proposition that if the informant's statements are declarations against interest, it is a sufficient basis for a finding of the informant's reliability and credibility, at least when coupled with a showing that the person alleged to be carrying on the illegal activity has a reputation for engaging in such activities. That is either a misunderstanding or an incomplete statement. The opinion in *Harris* stated in part as follows:

> . . . While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report of an unnamed informant, we conclude that the affidavit in the present case contained an ample factual basis for believing the informant which, when coupled with affiant's own knowledge of the respondent's background, afforded a

basis upon which the magistrate could reasonably issue a warrant. The accusation by the informant was plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself. This will be developed in part III.

It is obvious that the statement in the foregoing opinion that the informant could be considered reliable when he made a declaration against interest that the court meant an incriminating statement which would uphold prosecution. In the case before us not only would the informant's statement not uphold prosecution, it is not even incriminating as there is no way to prosecute him for the alleged participation in the illegal sale of marijuana.

Another case relied upon by the appellant was *Maxwell v. State*, 259 Ark. 86, 531 S.W.2d 468 (1976). This case was decided prior to the effective date of our Rules of Criminal Procedure. nevertheless the informant, a man named Harris, gave information to the affiant that he participated in the crime with Maxwell. In fact, Harris was at the time under arrest for the same crime for which Maxwell was charged. It seems then that *Maxwell* holds that the informant must have proven his reliability and did so in this case by incriminating himself in furnishing the information. This is supportive of the appellee's position in this matter.

It is not by accident that the Fourth and Fourteenth Amendments to the Constitution of the United States and Art. 2 §15 of the Constitution of Arkansas have remained undisturbed for more than a hundred years. It is obvious that the people are content with the protection now afforded the citizens of this state and nation to be relatively secure in their homes and their automobiles without fear of illegal and unwarranted intrusion. It may seem harsh at times to forbid officers from making a search in a situation where there is

known criminal activity taking place. However, the courts should be zealous in restricting searches to such situations where the information is reliable and there is indeed probable cause for the issuance of a search warrant. If the courts become lax and allow unreliable hearsay statements to constitute the foundation for the issuance of a search warrant, then we would soon see an end to the meaningful application of our present constitutional safeguards. No domicile would be safe because a disgruntled neighbor or former friend could have a search warrant issued for purely personal reasons.

We think the trial court rendered the proper decision and was correct in suppressing the evidence because of the deficiency in the affidavit for a search warrant.

Affirmed.

Hickman, Dudley and Hays, JJ., dissent.